

PURSUANT TO § 50-b OF THE NEW YORK STATE CIVIL RIGHTS LAW,
THIS DOCUMENT IS NOT AVAILABLE FOR PUBLIC INSPECTION
IN THAT IT IDENTIFIES THE VICTIM OF A SEX OFFENSE

STATE OF NEW YORK: COUNTY COURT
DUTCHESS COUNTY

_____^x
THE PEOPLE OF THE STATE OF NEW YORK,

- against -

CRAIG GABBIDON,

Defendant.

AFFIRMATION IN ANSWER TO
A MOTION TO VACATE A
JUDGMENT OF CONVICTION

CPL § 440.10

Superceding Ind. # 121/13

_____^x
BRIDGET RAHILLY STELLER, being duly licensed to practice law in the State
of New York, hereby affirms under penalty of perjury:

1. That she is the Chief Assistant District Attorney of Dutchess County and
makes this affirmation in answer to defendant's pro se motion seeking an Order Vacating his
judgment of conviction on the ground that the judgment of conviction was obtained in violation
of his constitutional rights.

2. The District Attorney submits that the motion ought to be denied on both
procedural and substantive grounds.

3. The District Attorney's records indicate that defendant-appellant was charged
by Superceding Indictment with one count of the Class B Violent Felony of Criminal Sexual Act
in the First Degree, one count of the in the Class B Violent Felony of Rape in the First Degree,
two counts of the Class E Felony of Criminal Sexual Act in the Third Degree, and one count of
the Class A Misdemeanor of Endangering the Welfare of a Child. Copies of that Indictment and
Bill of Particulars are attached as Exhibits 1 and 2.

4. The District Attorney's records indicate that on June 11, 2004, the day pre-trial Huntley and Sandoval hearings were to be held in this case, and while defendant Gabbidon represented by the Public Defender of Dutchess County, he appeared in this Court (Greller, J.), and entered a plea of guilty to one count of Criminal Sexual Act in the First Degree. A copy of the transcript of that proceeding is attached as Exhibit 3.

5. The District Attorney's records indicate that thereafter, defendant Gabbidon complained about counsel who represented him at the plea; the Court relieved the Public Defender and appointed attorney Eric S. Shiller to represent defendant Gabbidon. Attorney Shiller then filed a Motion to Withdraw the Guilty Plea in which defendant alleged that he had been pressured and badgered by one of the Assistant Public Defenders who represented him to enter the guilty plea. Attached as Exhibits 4, 5 and 6 are copies of the defendant's Motion and Supporting documents, the District Attorney's Answer and the defendant's Reply.

6. The District Attorney's records indicate that by Order dated October 15, 2014, a copy of which is attached as Exhibit 7, this Court (Greller, J.) denied that motion.

7. The District Attorney's records indicate that on December 23, 2014, defendant Gabbidon appeared in County Court with his attorney, Mr. Shiller, and Judge Greller sentenced defendant to a determinate term of 15 years in prison to be followed by ten post release supervision and directed him to pay the mandatory surcharge and fees. A copy of the transcript of that proceeding is attached as Exhibit 8.

8. The District Attorney's records indicate that defendant Gabbidon took an appeal to the New York State Supreme Court, Appellate Division, Second Judicial Department and his assigned appellate counsel filed a brief raising the following three points: (1) The Lower

Court Erred in Denying the Motion to Withdraw Because it Failed to Recognize its Own Misstatement of Sentencing Law; (2) Appellant Was Deprived of the Effective Assistance of Counsel; and (3) This Court Should Modify the Sentence. Copies of the Appellant's and Respondent's Briefs are attached as Exhibits 9 and 10.

9. The District Attorney's records indicate that by Decision/Order dated December 2, 2015, a copy of which is attached as Exhibit 11, the Appellate Division affirmed defendant Gabbidon's judgment of conviction. 134 A.D.3d 736.

10. The District Attorney's records indicate that by letter dated January 31, 2016, a copy of which is attached as Exhibit 12, defendant Gabbidon sought leave to appeal to the Court of Appeals. A copy of the District Attorney's response to Chief Judge Janet DiFiore is attached as Exhibit 13.

11. The District Attorney's records indicate that by Certificate dated March 31, 2016, Chief Judge DiFiore denied that application. 27 N.Y.3d 964. See Exhibit 14.

12. Defendant now seeks an Order Vacating his judgment of conviction (CPL § 440.10 (1) (h) on the ground that the judgment was obtained in violation of his rights under both the federal and state constitution.

13. The District Attorney denies defendant Gabbidon's allegations and submits that the motion ought to be denied on procedural and/or substantive grounds.

14. Criminal Procedure Law § 440.10 (2) (c) provides:

Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

...
(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon

appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to defendant's . . . unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

15. Criminal Procedure Law § 440.10 (3) (a) provides:

Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined on appeal. . . .

16. Criminal Procedure Law § 440.30 (4) provides:

Upon considering the merits of the motion, the court may deny it without conducting a hearing if:

(a) The moving papers do not allege a ground constituting legal basis for the motion; or

(b) The motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one; or

(c) An allegation of fact essential to support the motion is conclusively refuted by unquestionable documentary proof; or

(d) An allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made solely by the defendant and is unsupported by any other affidavit or evidence, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true.

17. Here defendant Gabbidon alleges that his guilty plea was not intelligently, knowingly and voluntarily entered because the Court did not fully advise him concerning the scope of the post release supervision component of his sentence. That claim is not entirely accurate; the Court's advice concerning post release supervision is contained in the plea

transcript and, in any event, defendant has not explained how any period of post release supervision could affect him. On this record, defendant's claim at page 6 of his Memorandum of Law that he was tricked Jacks any ring of truth.

18. Specifically, during the plea colloquy, the following questions were asked and answers given:

THE COURT: Are you a citizen of the United States?

THE DEFENDANT: No, sir.

THE COURT: Where are you a citizen of?

THE DEFENDANT: Jamaica.

THE COURT: Do you understand there are collateral consequences to this plea of guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Mungavin [defense counsel], tell me, put on the record, if you would, what you have explained to your client as to the collateral consequences of this plea?

MS. MUNGAVIN: Judge, I have explained to Mr. Gabbidon a number of times, we have discussed this, that since he is not a citizen, and this is a crime of moral turpitude, it is likely that he would be deported when he is released from prison.

THE COURT: Did Mr. Rosen [defense counsel] also discuss this with him?

MS. MUNGAVIN: I'm not sure if Mr. Rosen talked to him about it. I have talked to him a number of times. I have talked to his family as well, Judge.

THE COURT: Do you understand what your attorney said about possibly being deported?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. I need to tell you, Mr. Gabbidon, that by pleading to this crime, which is criminal sexual act in the first degree, or any crime under this indictment, you will be deported. It's a crime of moral turpitude. You will serve whatever time you serve in state's prison and you will be deported.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: With full knowledge of that are you willing to go ahead with this plea?

THE DEFENDANT: Yes.

Do you understand that the maximum penalty for this

crime is 25 years in state's prison?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that the maximum penalty for the second count, which is rape in the first degree, is also 25 years?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that because of the nature of the allegations in the superseding indictment, you could be sentenced consecutively?

THE DEFENDANT: Yes, sir.

THE COURT: Your attorney, the Assistant District Attorney, have been discussing this case and had a conference with me earlier this afternoon.

It's my understanding at the time of sentence I would cap your sentence at 15 years' determinative in state's prison, plus post release supervision, and I believe the post release supervision is, bear with me a minute, I believe it's between two and a half and five years in post release supervision.

Do you understand that?

THE DEFENDANT: Yes, sir.

Exhibit 3 at pp. 12 - 14.

19. On December 23, 2014, defendant Gabbidon appeared in County Court for sentencing. Near the beginning of the proceeding, the prosecutor read a statement from the victim who concluded her statement with the following: "I would just ask that we go with the fifteen years determinate which was agreed upon with ten years post-release supervision. Exhibit 8 at p. 3. Defense counsel did not refer to the period of post release supervision in his remarks. Instead, he asked the Court to be lenient and impose less than the bargained for 15 year determinate sentence, Id. at 4-5. When defendant addressed the Court, he maintained that he was innocent and blamed one of the Assistant Public Defenders for coercing his guilty plea, but he too never mentioned the period of post release supervision. Id. at 5-6. When the Court addressed the defendant, after rejecting defendant's claim that he was falsely accused, and noting

defendant's "history of non-compliance with the law" and sentenced him to a determinate term of fifteen years with ten years post release supervision. *Id.* at 6-9. Significantly, neither defendant Gabbidon nor his attorney objected to the term of post release supervision.

20. Although defendant Gabbidon took an appeal to the Appellate Division in which he raised three points, he made no complaint about the ten year period of post release supervision.

21. Since the facts relating to defendant's claim that his guilty plea was not knowingly, voluntarily and intelligently entered because the length of the period of post release supervision imposed at sentence exceeded the period mentioned at the guilty plea appear on the Record, this motion ought to be denied pursuant to CPL § 440.10 (2) (c). *See People v. Stewart*, 16 N.Y.3d 839, 840-41 (2011) ("As far back as 1986, this Court had made clear that '[w]hen, as will usually be the case, sufficient facts appear on the record to permit the question to be reviewed, sufficiency of the plea allocution can be reviewed only on direct appeal.'") *See also Smalls v. Lee*, 2016 U.S. Dist. LEXIS 129881, 12-CV-2083 (KMK) (JMS) (S.D.N.Y. 9/22/16) at p. 20.

22. Moreover, as argued in paragraphs _____ *infra*, because of defendant's immigration status, the term of post release supervision is a non-issue in his case and therefore, any statements relating to it could have had no impact on the plea itself. In sum, on this record and because of defendant's immigration status, issues relating to post release supervision could not impact the knowing, intelligent and voluntary nature of the guilty plea itself.

23. Next defendant alleges that he received ineffective assistance of counsel because the attorney(s) who represented him at the guilty plea was unaware that the authorized

period of post release supervision was a period ranging between five and twenty years. There is no basis on this record for this speculation. It should be noted that after the guilty plea was entered, defendant complained about his attorneys. The Court relieved them and while represented by new counsel, defendant filed a Motion to Withdraw his Guilty Plea. Significantly, he raised no issue relating to post release supervision in that motion and at sentencing, he raised no complaint about the length of the period of post release supervision and he raised no issue relating to post release supervision on his direct appeal.

24. First, defendant has not established with sworn allegations of fact that at the time he entered this guilty plea his attorney was unaware of the authorized period for post release supervision. His argument is based on speculation and therefore it ought to be summarily rejected. See CPL § 440.30 (4) (b).

25. Second, this prong of the motion ought to be denied pursuant to CPL § 440.10 (3) because defendant unjustifiably failed to place the facts necessary to review this claim on the record and as a result, this specific claim could not have been determined on the appeal which defendant Gabbidon took and perfected.

26. In any event, the record reveals that the term of post release supervision will have no effect on defendant Gabbidon. Therefore, nothing related to post release supervision can impact the representation provided to him.

27. If this Court considers this claim on the merits, the claim should be rejected because the record establishes that defendant received meaningful assistance of counsel (state standard) (see People v. Benevento, 91 N.Y.2d 708, 713-15 (1998); People v. Baldi, 54 N.Y.2d 137, 147 (1981); People v. Watson, _____ A.D.3d _____, 2010-05881 (2d Dept. 7/5/12) (mem.)), and

that counsel's performance could not be characterized as either deficient or prejudicial to the defendant (federal standard). See Strickland v. Washington, 466 U.S. 688 (1984). See also People v. Brooks, 36 A.D.3d 929, 930 (2d Dept.) (mem.), appeal denied 9 N.Y.3d 840 (2007); People v. Sierra, 173 A.D.2d 211 (1st Dept.) (mem.), appeal denied 78 N.Y.2d 974 (1991).

28. As a practical matter, the record establishes that the period of post release supervision was a non-issue in this case and the Court specifically advised defendant at the time he entered his guilty plea, that upon release from prison, he would be deported. Exhibit 3 at p. 13.

29. Almost six years ago, in Premo v. Moore, 562 U.S. 115, 124 (2011), in reviewing a claim of ineffective assistance of counsel in a federal habeas corpus proceeding, the Supreme Court recognized:

Acknowledging guilt and accepting responsibility by an early plea respond to certain basic premises in the law and its function. Those principles are eroded if a guilty plea is too easily set aside based on facts and circumstances not apparent to a competent attorney when actions and advice leading to the plea took place. Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. The opportunities, of course, include pleading guilty to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer if the case grows stronger and prosecutors find stiffened resolve. . . .

30. This ruling was consistent with the Court's previous ruling in Hill v. Lockhart, 474 U.S. 52, 59 (1985) that in order to establish that counsel was ineffective in a conviction based on a guilty plea, a defendant must not only show that counsel's advice was not within the standards of reasonable competence and that there is a reasonable probability that

based on counsel's incorrect advice, there is a reasonable probability that he would have insisted on pleading guilty.

31. Here defendant has not and cannot meet his burden of establishing that counsel was ineffective.

32. Defendant faces mandatory deportation upon release from prison; he was convicted of engaging in anal sexual conduct with a minor who was physically helpless by reason of intoxication. See Exhibits 1, 2 and 3. Therefore, this conviction is for an aggravated felony as defined in 8 U.S.C § 1101 (a) (43) (A) and he is deportable under 8 U.S.C. § 1227 (a) (2) (A) (iii). See Silva v. Gonzales, 455 F.3d 26, 29 (1st Cir. 2006). See also Ashton v. Gonzales, 431 F.3d 95 (2d Cir. 2005). As the Supreme Court recognized in Padilla v. Kentucky, 559 U.S. 356, 363-64 (2010) "If a non-citizen commits a removable offense after the 1996 effective date of these amendments [110 Stat. 3009-596] his removal is practically inevitable . . ."

33. Here, since the defendant's removal is virtually inevitable by virtue of his aggravated felony conviction and both his attorney and the Court advised him that he would be deported upon release from prison, (Exhibit 3 at pp. 12-13) he cannot establish that he was adversely impacted by anything relating to post release supervision since he should be deported before he is subject to such supervision.

34. As the Supreme Court recognized in North Carolina v. Alford, 400 U.S. 25, 31 (1970) the test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant." Here, the objective facts as well as the defendant's sworn statements during the plea colloquy refute defendant's present complaints that he received ineffective assistance of counsel or that he

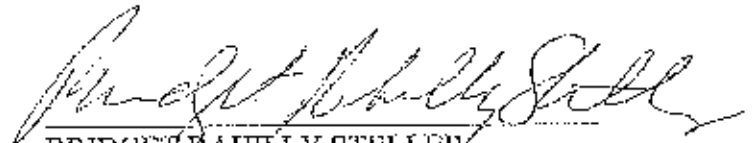
received less than meaningful assistance from his attorney. See People v. Benevento, 91 N.Y.2d 708, 712 (1998); People v. Baldi, 54 N.Y.2d 137, 147 (1998).

35. The District Attorney submits that no hearing is required to determine this motion. See People v. Satterfield, 66 N.Y.2d 796, 799 (1985).

36. In sum, the District Attorney submits that this motion ought to be summarily denied based on the procedural bars contained in CPL § 440.10 (1) and (2), or in the alternative, the motion ought to be denied pursuant to CPL § 440.30 (4) (a), (b) and (d).

Wherefore, for all the foregoing reasons, your affiant respectfully requests that the motion be, in all respects, summarily denied.

Dated: October 12, 2016
Poughkeepsie, New York


BRIDGET RAHILLY STELLER

PURSUANT TO §50-B OF THE NEW YORK STATE CIVIL RIGHTS LAW, THIS DOCUMENT IS NOT AVAILABLE FOR PUBLIC INSPECTION IN THAT IT IDENTIFIES THE VICTIM OF A SEX OFFENSE.

STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

CRAIG E. GABBIDON

Defendant.
-----X

**SUPERSEDING
INDICTMENT 121/2013**

Dated the 22nd day of January, 2014

THE GRAND JURY OF THE COUNTY OF DUTCHESS, by this Indictment, accuses CRAIG E. GABBIDON of the crime of CRIMINAL SEXUAL ACT IN THE FIRST DEGREE, A CLASS B VIOLENT FELONY, in violation of §130.50, subdivision 2, of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of Hyde Park, County of Dutchess and State of New York, on March 3, 2013, engaged in anal sexual conduct with another person, to wit: Yolanda Reyes, who is incapable of consent by reason of being physically helpless.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses CRAIG E. GABBIDON of the crime of RAPE IN THE FIRST DEGREE, A CLASS B VIOLENT FELONY, in violation of §130.35, subdivision (2) , of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of Hyde Park, County of Dutchess and State of New York, on March 3, 2013, engaged in sexual intercourse with another person, to wit: Yolanda Reyes, who was incapable of consent by reason of being physically helpless.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses CRAIG E. GABBIDON of the crime of CRIMINAL SEXUAL ACT IN THE THIRD DEGREE, A CLASS E FELONY, in violation of §130.40, subdivision 2, of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of Hyde Park, County of Dutchess and State of New York, on March 3, 2013, being more than twenty-one (21) years old, engaged in anal sexual conduct with another person, to wit: Yolanda Reyes, who was less than seventeen (17) years old.

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses CRAIG E. GABBIDON of the crime of CRIMINAL SEXUAL ACT IN THE THIRD DEGREE, A CLASS E FELONY, in violation of §130.40, subdivision 2, of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of Hyde Park, County of Dutchess and State of New York, on March 3, 2013, being more than twenty-one (21) years old, engaged in oral sexual conduct with another person, to wit: Yolanda Reyes, who was less than seventeen (17) years old.

FIFTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses CRAIG E. GABBIDON of the crime of ENDANGERING THE WELFARE OF A CHILD, A CLASS A MISDEMEANOR, in violation of §260.10, subdivision 1, of the Penal Law of the State of New York, committed as follows:

The said defendant, in the County of Dutchess and State of

New York, on March 3, 2013, knowingly acted in a manner likely to be injurious to the physical, mental and moral welfare of a child, to wit: Yolanda Reyes, who was a child less than seventeen (17) years old.

MARJORIE J. SMITH
Acting District Attorney

A TRUE BILL

THERESA MAHER
Foreperson of the Grand Jury
Sixth Term - 2013

PEOPLE v. CRAIG E. GABBIDON

**ALIBI DEMAND
CPL §250.20**

PLEASE TAKE NOTICE, that if you or any of you intends to offer a trial defense, that at the time of the commission of the crime or crimes charged you were at some place or places other than the scene of the crime or crimes, and to call witnesses in support of such defense, you must, within eight (8) days from the date of service hereof, serve upon the District Attorney of Dutchess County, and file a copy thereof with the Court, a "Notice of Alibi" reciting:

- (a) The place or places where you claim to have been at the time of the commission of the alleged crime or crimes.
- (b) The names, the residential addresses, the places of employment, and the addresses thereof, of every such alibi witness upon whom you intend to rely.

PLEASE TAKE FURTHER NOTICE, that if at trial you call such an alibi witness without having served the demanded Notice of Alibi, or if having served such a notice, you call a witness not specified therein, the People will move to exclude any testimony of such witness relating to the alibi defense.

Yours, etc.,

WILLIAM V. GRADY
Dutchess County District Attorney
236 Main Street
Poughkeepsie, New York 12601

PURSUANT TO §50-B OF THE NEW YORK STATE CIVIL RIGHTS LAW, THIS DOCUMENT IS NOT AVAILABLE FOR PUBLIC INSPECTION IN THAT IT IDENTIFIES THE VICTIM OF A SEX OFFENSE.

STATE OF NEW YORK: COUNTY OF DUTCHESS
COUNTY COURT

-----X
THE PEOPLE OF THE STATE OF NEW YORK

- against -

**BILL OF PARTICULARS
SUPERSEDING
IND. #121/2013**

CRAIG E. GABBIDON

Defendant.
-----X

The Plaintiff, as and for its Bill of Particulars, alleges:

As to all counts of the Superseding Indictment:

- A. The date when the crimes were committed was on March 3, 2013.
- B. The time when the crimes were committed was on about and between 2:00 in the afternoon and 8:00 in the evening.
- C. The place where the crimes were committed was in the Town of Hyde Park, County of Dutchess and State of New York, more particularly at 4171 Albany Post Road.

Substance of Defendant's Conduct as to
All Counts of the Superseding Indictment

On the above date, time and place, the said defendant purchased alcohol for Yolanda Reyes and her friend at a liquor store in the City of Poughkeepsie. Yolanda Reyes became extremely intoxicated off of the alcohol the Defendant purchased for her. The Defendant placed Yolanda and her friend in his truck and drove them to a motel in Hyde Park. The Defendant carried Yolanda in the motel as she was too intoxicated to walk. While in the motel, the Defendant removed Yolanda's clothing and subjected her to contact between his penis and her anus, her vagina and her mouth. He did so for the purpose of his own sexual gratification. Yolanda Reyes was incapable of consenting to these acts as she was less than seventeen (17) years old, having been born on

November 7, 1996, and because she was physically helpless because she was intoxicated.

Dated: January 22, 2014
Poughkeepsie, New York

WILLIAM V. GRADY
Dutchess County District Attorney

BY: ALLISON J. STUART
Senior Assistant District Attorney
236 Main Street
Poughkeepsie, New York 12601

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

- - - - - X

PEOPLE OF THE STATE OF NEW YORK, PLEA OF GUILTY

-against- INDEX #2014/0536

CRAIG E. GABBIDON, SUP IND. #121/2013

Defendant. NYSID #12439269Z
CC #66273589H
d/o/b 6/27/79

- - - - - X

Dutchess County Courthouse
10 Market Street
Poughkeepsie, New York 12601
June 11, 2014

BEFORE: HONORABLE STEPHEN L. GRELLER
County Court Judge

APPEARANCES:

WILLIAM V. GRADY, ESQUIRE
District Attorney of Dutchess County
236 Main Street
Poughkeepsie, New York 12601
BY: ALLISON J. STUART, ESQUIRE
Assistant District Attorney

THOMAS N. N. ANGELI, ESQUIRE
Public Defender of Dutchess County
22 Market Street
Poughkeepsie, New York 12601
BY: SUSAN MUNGAVIN, ESQUIRE, and ALEX ROSEN,
ESQ., Assistant Public Defenders

CRAIG E. GABBIDON, Defendant

Barbara B. Dalzell
Official Court Reporter

2015 APR 28 AM 10:31

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CLERK OF COURT
DUTCHESS COUNTY

1 (June 11, 2014, 2:33 P.M. in court, attorneys
2 present.)

3 THE COURT: Can I have a sidebar with
4 the attorneys?

5 (Off the record discussion at the sidebar between
6 the attorneys and the Court.)

7 (Defendant enters the courtroom.)

8 THE COURT: This is the matter of People
9 versus Craig Gabbidon.

10 This matter is scheduled today for a
11 combined Huntley and Sandoval Hearing
12 pursuant to this Court's previously entered
13 order.

14 It's my understanding, after discussing
15 this matter with the attorneys, that we have
16 a proposed disposition.

17 Is that correct?

18 MS. MUNGAVIN: We do, Your Honor.

19 THE COURT: It's my understanding that
20 Mr. Gabbidon will agree to withdraw his
21 previously entered plea of not guilty to
22 Superseding Indictment #121 for the year
23 2013, and in its stead plead guilty to the
24 first count which charges criminal sexual act
25 in the first degree, in full satisfaction of

1 the remaining counts of the indictment of
2 which there are five counts.

3 Is that correct?

4 MS. MUNGAVIN: Yes, Your Honor.

5 THE COURT: Is that correct, Mr.
6 Gabbidon?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Mr. Gabbidon, the Clerk of
9 the Court is going to swear you in.

10 CRAIG GABBIDON, the defendant, having
11 been duly sworn by the Clerk of the Court,
12 responded as follows:

13 THE COURT CLERK: Please state your full
14 name for the record.

15 THE DEFENDANT: Craig Elazie Gabbidon.

16 THE COURT CLERK: Your date of birth,
17 sir?

18 THE DEFENDANT: 6/27/1979.

19 THE COURT CLERK: Thank you.

20 THE COURT: Mr. Gabbidon, it's my
21 understanding at this time you wish to
22 withdraw your previously entered plea of not
23 guilty to Superseding Indictment #121 for the
24 year 2013 and in its stead plead guilty to
25 the first count of that indictment, which

1 charges you with the crime of criminal sexual
2 act in the first degree in full satisfaction
3 of the entire indictment.

4 Is that correct, sir?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay. Mr. Gabbidon, the
7 first count of Superseding Indictment #121
8 for the year 2013 charges you with the crime
9 of criminal sexual act in the first degree, a
10 Class B violent felony, in violation of
11 Section 130.50, Subdivision 2, of the Penal
12 Law.

13 And that count alleges that you, in the
14 Town of Hyde Park, County of Dutchess, State
15 of New York, on March 3, 2013, engaged in
16 anal sexual conduct with another person, to
17 wit, I will use the initials, YR, who was
18 incapable of consent by reason of being
19 physically helpless.

20 How do you plead to that count, sir?

21 THE DEFENDANT: Guilty, Your Honor.

22 THE COURT: Before I accept your guilty
23 plea, I'm going to ask you some questions to
24 make sure that I know that you understand
25 what you're doing and that you're doing this

1 voluntarily.

2 First of all, do you realize that
3 instead of pleading guilty, you could have a
4 jury trial?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you also understand that
7 by pleading guilty, you are waiving your
8 right to the hearing, that was a Huntley
9 Hearing, that was scheduled to begin today at
10 approximately two o'clock?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: The first thing that would
13 happen at a jury trial, sir, is we would
14 select a jury. We would do that by your
15 attorney, the Assistant District Attorney,
16 and me asking potential jurors questions. As
17 you went along, you and your attorney would
18 be able to excuse people from serving on the
19 jury. There would come a point that twelve
20 people would be sworn to be jurors and they
21 would be the jury in your case.

22 Do you understand that?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: The prosecutor would be
25 obligated to prove every element of the crime

1 charged against you beyond a reasonable
2 doubt. The prosecutor would attempt to do
3 that by calling witnesses to testify and by
4 offering whatever other evidence there might
5 be.

6 Your attorney would be able to
7 cross-examine the witnesses, she would be
8 able to challenge the admissibility of the
9 other evidence, and at the end of the case
10 she could argue to the jury as to what weight
11 or what consideration they should give to the
12 evidence.

13 Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: The way the trial would
16 proceed is that the prosecutor would go first
17 and present evidence which is referred to as
18 the People's case.

19 After that, your attorney could argue
20 immediately to the jury that the People did
21 not prove your guilt beyond a reasonable
22 doubt or instead your attorney could first
23 present witnesses or other evidence on your
24 behalf.

25 And if you had witnesses who were

1 reluctant to come to court, your attorney
2 could issue a subpoena, which is a court
3 order directing that they come here and
4 testify.

5 Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: If you wanted to testify at
8 the trial, that, of course, would be your
9 right.

10 On the other hand, if you did not want
11 to testify, the jury could not hold that
12 against you. That's because you have a
13 constitutional right to remain silent, a
14 right not to incriminate yourself, and you
15 would have no obligation to prove anything at
16 a trial.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: At the end of the trial,
20 after hearing arguments on your behalf from
21 your attorney, you could not be convicted of
22 this crime or any related crime unless all
23 twelve jurors agreed that the People had
24 proved your guilt beyond a reasonable doubt.

25 Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Instead of a jury trial, you
3 could have a nonjury trial. The presentation
4 of evidence would take place in the same
5 manner that I just described, except the
6 decision as to whether your guilt had been
7 proved beyond a reasonable doubt would be
8 made by me alone rather than a jury.

9 Do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And in pleading guilty, you
12 are giving up your right to a trial, your
13 right to remain silent, and your right not to
14 incriminate yourself with respect to this
15 charge.

16 Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Have you discussed your
19 guilty plea with Ms. Mungavin and Mr. Rosen?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Have you discussed with them
22 what happened back in March of 2013?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Have you talked to your
25 lawyers about whatever factual or legal

1 issues there might be in your case including
2 any and all possible defenses you may have?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Have you had enough time to
5 discuss everything about this case with your
6 attorneys?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Are you satisfied with their
9 advice and services?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And based upon your own
12 knowledge as to what happened as well as your
13 conversations with your attorneys, have you
14 concluded that it is in your best legal
15 interests to plead guilty today?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Are you pleading guilty
18 voluntarily?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Are you pleading guilty
21 because you are, in fact, guilty?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Do you feel you have been
24 threatened, coerced, forced, or pressured by
25 anybody into pleading guilty?

1 THE DEFENDANT: No, sir.

2 THE COURT: During the past six months
3 have you been treated for any alcohol or drug
4 abuse or undergone any counseling for any
5 psychological or emotional problems?

6 THE DEFENDANT: No, sir.

7 THE COURT: Are you presently under the
8 care of a doctor for any reason?

9 THE DEFENDANT: Could you repeat the
10 question?

11 THE COURT: Yes. Are you presently
12 seeing a doctor at the jail?

13 THE DEFENDANT: Not really, no. I --

14 MS. MUNGAVIN: Just regular --

15 THE COURT: Are you taking any
16 medication?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: What type of medication do
19 you take?

20 THE DEFENDANT: Blood pressure medicine.

21 THE COURT: Okay. What do you take? Do
22 you remember the name of it?

23 THE DEFENDANT: Lisinopril, Norvasc. I
24 don't remember the last one. It's a yellow
25 pill. It's a water pill. I don't remember

1 the name of it.

2 THE COURT: Do you take them on a daily
3 basis?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Do you take them at night or
6 during the day?

7 THE DEFENDANT: Every afternoon.

8 THE COURT: Did you take yours yet
9 today?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you believe as you stand
12 here this afternoon that you are completely
13 clearheaded and understand everything that is
14 happening?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, in addition to the
17 sentence to be imposed, a felony conviction
18 has other consequences.

19 For example, if you are convicted of
20 another felony sometime in the next ten
21 years, the sentence for that future felony
22 would be more severe because of this
23 conviction, you also lose certain civil
24 rights, and a felony conviction is an
25 impediment, that means a bar, to receiving

1 certain kinds of licenses.

2 Do you understand that?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Are you a citizen of the
5 United States?

6 THE DEFENDANT: No, sir.

7 THE COURT: Where are you a citizen of?

8 THE DEFENDANT: Jamaica.

9 THE COURT: Do you understand there are
10 collateral consequences to this plea of
11 guilty?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Ms. Mungavin, tell me, put
14 on the record, if you would, what you have
15 explained to your client as to the collateral
16 consequences of this plea.

17 MS. MUNGAVIN: Judge, I have explained
18 to Mr. Gabbidon a number of times, we have
19 discussed this, that since he is not a
20 citizen, and this is a crime of moral
21 turpitude, it is likely that he would be
22 deported when he is released from prison.

23 THE COURT: Did Mr. Rosen also discuss
24 this with him?

25 MS. MUNGAVIN: I am not sure if

1 Mr. Rosen talked to him about it. I have
2 talked to him a number of times. I have
3 talked to his family as well, Judge.

4 THE COURT: Do you understand what your
5 attorney said about possibly being deported?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Okay. I need to tell you,
8 Mr. Gabbidon, that by pleading to this crime,
9 which is criminal sexual act in the first
10 degree, or any crime under this indictment,
11 you will be deported. It's a crime of moral
12 turpitude. You will serve whatever time you
13 serve in state's prison and you will be
14 deported.

15 Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: With full knowledge of that,
18 are you willing to go ahead with this plea?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand that the
21 maximum penalty for this crime is 25 years in
22 state's prison?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you also understand that
25 the maximum penalty for the second count,

1 which is rape in the first degree, is also 25
2 years?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand that
5 because of the nature of the allegations in
6 the superseding indictment, you could be
7 sentenced consecutively?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Your attorney, the Assistant
10 District Attorney, have been discussing this
11 case and had a conference with me earlier
12 this afternoon.

13 It's my understanding at the time of
14 sentence I would cap your sentence at 15
15 years' determinative in state's prison, plus
16 postrelease supervision, and I believe the
17 postrelease supervision is, bear with me a
18 minute, I believe it's between two and a half
19 and five years in postrelease supervision.

20 Do you understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: In addition, you would be
23 required to pay certain surcharges as a sex
24 offender surcharge, sex offender fees, the
25 total of which is \$1,425.

1 In addition, you would be required to
2 register as a sex offender.

3 Do you understand all of that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: I told your attorney I'm
6 going to assume that is the sentence that
7 would be imposed.

8 On the other hand, if after reading the
9 presentence report or otherwise learning
10 something about you I find in good conscience
11 I cannot impose that sentence, then I would
12 give you the opportunity to withdraw your
13 guilty plea and we would start all over
14 again.

15 Do you understand that?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: I also want you to know if
18 between now and the sentence date it's
19 learned that you fail to cooperate with,
20 mislead or lie to the Probation Officer who
21 will interview you for the presentence
22 report, or if you commit a new offense or are
23 appropriately arrested for a new offense,
24 which does not mean convicted, or if you
25 deliberately fail or refuse to appear here

1 for sentence, if any one of those things
2 occurred, you would not be allowed to
3 withdraw your guilty plea and you would be
4 subject to a more severe sentence.

5 Do you understand that?

6 THE DEFENDANT: Yes.

7 THE COURT: Have you understood
8 everything I have said so far?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you have any questions
11 you would like to ask either myself or Ms.
12 Mungavin?

13 THE DEFENDANT: No, sir.

14 THE COURT: Then I'm going to ask you
15 once again, how do you plead to the crime of
16 criminal sexual act in the first degree, a
17 Class B violent felony?

18 THE DEFENDANT: Guilty, sir.

19 THE COURT: Tell me what you did under
20 the first count in the Town of Hyde Park on
21 March 3, 2013, with regard to a young person
22 by the initials YR that makes you guilty of
23 this crime.

24 THE DEFENDANT: I engaged in anal sexual
25 conduct with a person being physically

1 helpless.

2 THE COURT: This took place in the Town
3 of Hyde Park?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Day or night?

6 THE DEFENDANT: Day.

7 THE COURT: And at the time you said you
8 engaged in anal sexual contact, do you admit
9 that there was contact between your penis and
10 this girl's anus?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And at the time you had that
13 contact, this girl was physically helpless,
14 in other words she was unconscious; is that
15 correct?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: And was she unconscious
18 because of the consumption of alcohol?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Any questions based upon
21 that?

22 MS. STUART: No, Judge.

23 THE COURT: And at the time you
24 committed this act, you had no permission or
25 authority to do this, did you?

1 THE DEFENDANT: No, sir.

2 THE COURT: And she did not consent; is
3 that correct?

4 THE DEFENDANT: No, sir.

5 THE COURT: I find that the defendant
6 has pled guilty knowingly and voluntarily and
7 admitted the essential elements of the crime
8 of which he now stands convicted.

9 MS. MUNGAVIN: Judge, I should have put
10 on the record that Mr. Gabbidon's wife, Luz
11 Gabbidon, and his sister-in-law are present
12 in the courtroom.

13 THE COURT: Do you have any idea when we
14 can do this?

15 THE COURT CLERK: 7/14.

16 THE COURT: Does that work for you?

17 MS. MUNGAVIN: Yes, Judge.

18 THE COURT: Okay. The sentence will be
19 July 14th.

20 MS. MUNGAVIN: Judge, I will talk to
21 Probation, but I ask that Probation notify me
22 when they go to see him to do the presentence
23 interview.

24 THE COURT: Why don't you just mention
25 it to Mr. Callahan.

1 MS. MUNGAVIN: Okay, thank you.

2 THE COURT CLERK: Bail conditions, Your
3 Honor?

4 THE COURT: None.

5 MS. MUNGAVIN: Thank you, Judge.

6 THE COURT: Thank you, Ms. Mungavin.
7

8 (2:55 P.M. adjourned.)
9

10 -----

11

12 This is to certify that the foregoing
13 is an accurate transcription of my
14 stenographic notes as transcribed by me.

15

16



17

Barbara B. Dalzell
Official Court Reporter

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STATE OF NEW YORK
COUNTY COURT: COUNTY OF DUTCHESS

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

- against -

CRAIG E. GABIDDON,

Defendant.
-----X

NOTICE OF MOTION TO
WITHDRAW PLEA

Indictment # 121/2013

(Hon. Stephen L. Greller)

SIRS:

PLEASE TAKE NOTICE that upon the annexed Affirmation of Craig E. Gabiddon, the defendant, and upon all papers and proceedings heretofore had herein, Eric S. Shiller, Esq., attorney of record for the defendant will move this Court at a term thereof to be held in the Dutchess County Court, located at 10 Market Street, Poughkeepsie, New York on the 18th day of September, 2014, at 9:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard for an order granting the following relief:

1. For an order pursuant to Criminal Procedure Law §220.60(3) permitting the defendant to withdraw his prior guilty plea for the reasons set forth in the attached affirmation of the defendant, CRAIG E. GABIDDON.

PLEASE TAKE FURTHER NOTICE that the defendant reserves the right to make any and all further motions necessary in order to protect his rights under the United States and New York State Constitutions and under all federal and state statutes upon learning that grounds for such exist.

As to each of the above requests, for such other and further relief as the Court

may deem just and proper.

Dated: Poughkeepsie, New York
September 10, 2014

Respectfully Submitted,

ERIC S. SHILLER, ESQ.
Attorney for the Defendant
ERIC S. SHILLER LAW OFFICE, P.C.
54 Noxon Street
P.O. Box 774
Poughkeepsie, New York 12602

To: Honorable Stephen L. Greller
Dutchess County Court
10 Market Street
Poughkeepsie, NY 12601

Allison J. Stuart, Esq.
Office of the Dutchess County District Attorney
236 Main Street
Poughkeepsie, NY 12601

STATE OF NEW YORK
COUNTY COURT: COUNTY OF DUTCHESS

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

- against -

AFFIRMATION

Indictment # 121/2013

CRAIG E. GABIDDON,

Defendant.
-----X

CRAIG E. GABIDDON, being duly sworn, deposes and states the following:

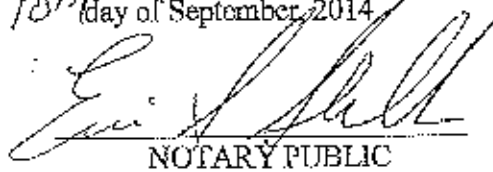
1. I am the defendant in this matter, and pled guilty to the charge of Criminal Sexual Act in the First Degree, a class B violent felony, in violation of Penal Law §130.50(2) on June 11, 2014.
2. My lawyer at the time of my plea, Susan Mungavin, Esq. of the Dutchess County Public Defender's Office pressured and badgered me to accept the proposed disposition and plead guilty. Ms. Mungavin pressured me by telling me that if I did not accept the plea offer that I would never see my family again. Additionally in pressuring me to plead guilty, my lawyer went as far as bringing my wife, Luz Gabiddon into the County courthouse lockup on June 11, 2014 to pressure me as well into accepting the plea offer. With these tactics used by my lawyer, I did not have a clear mind and I was coerced into pleading guilty.
3. I, Craig E. Gabiddon, further contend and state definitively that I am not guilty of the charge, and maintain my constitutional right to have my suppression hearing and my jury trial in this matter. I would not have waived the right to a hearing in this matter and would not have waived my right to a jury trial in this matter, absent the extreme

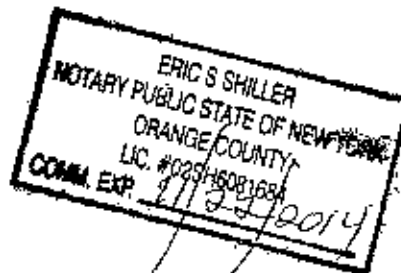
pressure my lawyer, Susan Mungavin, Esq. placed on me.

WHEREFORE, it is respectfully requested that the motion to withdraw my plea be granted in its entirety.


CRAIG E. GABIDDON

Sworn to before me this
10th day of September, 2014


NOTARY PUBLIC



STATE OF NEW YORK : COUNTY OF DUTCHESS

-----x
THE PEOPLE OF THE STATE OF NEW YORK

- against -

ANSWER IN RESPONSE
TO MOTION TO
WITHDRAW PLEA

CRAIG E. GABBIDON

SUPERCEDING
INDICTMENT #121/2013

Defendant.
-----x

Allison J. Stuart, being duly licensed to practice law in the State of New York, hereby affirms under penalty of perjury:

1. I am an Assistant District Attorney in Dutchess County and make this affirmation in answer to the defendant's motion, supported by the affirmation of Craig E. Gabbidon, seeking various forms of relief.
2. I am familiar with the facts and circumstances surrounding this matter since I was assigned by the District Attorney to prosecute this case.
3. This affirmation is made upon information and belief, sources thereof being investigation into this matter by the District Attorney's Office, conversations with the arresting officer, court records pertaining hereto, and all papers and proceedings heretofore had herein.

The Defendant moves this court for permission to withdraw his plea of guilty to Criminal Sexual Act in the First Degree, which occurred on June 11, 2014 before the Honorable Stephen L. Greller. In order for the court to consider

withdrawing a plea of guilty, there must be some evidence or claim of innocence, fraud or mistake in it's inducement. People v. Davis, 250 A.D.2d 939 (1998). In this case, the Defendant claims Susan Mungavin, Esq. pressured the defendant into pleading guilty by informing him of the sentence parameters (never seeing his family again) and by allowing his wife to see him in lock up upon his request whereby she spoke to him about his possible choices. The People submit that this does not satisfy the burden set forth in Davis.

First, with respect to a claim of innocence, the Defendant made a video recorded statement whereby he admits to the victim being intoxicated, taking her to a motel, getting her undressed and ejaculating on her. Further, the defendant is in possession of the DNA results that places his sperm in the anus, mouth and vagina of the victim. Therefore, the People submit that the defendant has not provided sufficient evidence to prove an assertion of innocence throughout this case.

Second, the defendant has not presented any evidence of fraud or mistake in terms of his plea. "Where a defendant has been fully informed of the rights he is waiving by pleading guilty and proceeds to admit the acts constituting the crime, a subsequent protestation of innocence which is not substantiated by any evidence is generally insufficient to support a request for vacatur of the plea." See, David at 940. In this case, the Court asked the defendant whether or not he was waiving his right to a Huntley hearing by pleading guilty, and the Defendant said yes. Further, the Court inquired about having a jury trial or a bench trial, whereby the People would have to prove every element beyond a reasonable doubt, and whether he understood that and still wanted to plead guilty, and the defendant answered in the affirmative. The Court further asked whether the defendant spoke with his attorneys about the case and all possible

defenses and having enough time to speak with them and he answered yes to those questions as well. The Court further inquired if the defendant was satisfied with the services of his attorney and that it is in his best legal interests to plead guilty and the defendant stated yes to those questions as well. The defendant acknowledged that he is pleading guilty voluntarily, because he is guilty, and that he was not threatened, coerced, forced, or pressured by anyone to plead guilty. The judge asked the defendant about any collateral consequences of pleading guilty with regards to his citizenship and was advised that this plea would result in deportation and the defendant understood this. The court advised the defendant of the sentencing parameters and the defendant acknowledged he understood. Lastly, the court asked the defendant what he did to make him guilty of the crime he was pleading to and he was able to tell the Court that he in fact had anal sexual contact with a female who was unconscious.

The defendant never stated that he was being pressured or coerced into pleading guilty and the Court outlined in detail every aspect of the plea. The People submit that the Defendant's contention that he was coerced into pleading guilty is without merit and the defendant's request to have his plea withdrawn should be denied.

WHEREFORE, for all the foregoing reasons, your affirmant respectfully request that the defendant's motion be denied in all respects except as hereinabove stated.

Dated: September 16, 2014
Poughkeepsie, New York

ALLISON J. STUART

STATE OF NEW YORK
COUNTY COURT: COUNTY OF DUTCHESS

-----X
THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff,

- against -

CRAIG E. GABIDDON,

Defendant.
-----X

REPLY AFFIRMATION

Indictment # 121/2013

(Hon. Stephen L. Greller)

SIRS:

ERIC S. SHILLER, ESQ., being duly admitted to practice before the Courts of the State of New York, under penalty of perjury hereby affirms that the statements herein are true, except as to those facts stated upon information and belief which are believed to be true.

1. Deponent is an attorney assigned to represent CRAIG E. GABIDDON, the above named defendant in the above-entitled action. This Affirmation is made in reply to the Answer in Response of Alison J. Stuart, ADA, dated September 16, 2014.

DEFENDANT'S REPLY

2. In the People's answer in response in opposition to defendant's motion to withdraw his plea, they cite *People v. Davis*, 250 A.D.2d 939 (1998) stating that there must be a claim of innocence among other things stated by the defendant to withdraw a defendant's plea. Here, the People only focus on the fact that the defendant, Craig E. Gabiddon moves the Court to withdraw his plea based on prior counsel pressuring the defendant to plead guilty and the People therefore state that this does not satisfy the burden as set forth in *Davis*.

However, the People intentionally fail to address the fact that in paragraph #3 of the defendant's affirmation supporting his motion to withdraw, Mr. Gabiddon clearly contends and states definitively that he is "not guilty of the charge" and therefore is innocent. This contention is in addition to Mr. Gabiddon's contention that prior counsel pressured him into pleading guilty despite his innocence however, the People do not address this and completely overlook defendant's contention of innocence. In order for the Court to consider granting a defendant's motion to withdraw a plea of guilty, there must be a claim of innocence. *People v. Cance*, 155 A.D.2d 764 (1989) as well as *People v. Davis*, 250 A.D.2d 939 (1998).

3. In the People's Answer in response, ADA Stuart wrongly asserts that the defendant, Craig E. Gabiddon admitted in the recorded video statement that he ejaculated on the complainant, knowing that this is completely inaccurate however intentionally misstating the facts in an attempt to sway the Court. The defendant never admitted to ejaculating on the complainant in any way. Furthermore, the People in an attempt to sway the Court even more, they intentionally misconstrue the DNA results in an attempt to attack the defendant's contention of innocence here.

WHEREFORE, I respectfully request that the motion to withdraw the defendant's plea be granted in its entirety and for such other and further relief as the Court may deem just and proper.

Dated: Poughkeepsie, New York
October 13, 2014


ERIC S. SHILLER, ESQ.
Attorney for the Defendant

To: Honorable Stephen L. Greller
Dutchess County Court
10 Market Street
Poughkeepsie, NY 12601

Allison J. Stuart, Esq.
Office of the Dutchess County District Attorney
236 Main Street
Poughkeepsie, NY 12601

COUNTY COURT : DUTCHESS COUNTY

PRESENT: HON. STEPHEN L. GRELLER
Dutchess County Court Judge

DECISION AND ORDER
MOTION TO WITHDRAW
GUILTY PLEA

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiff,

Superceding
Ind. No. 121/2013
Index No. 2014/0536

- against -

CRAIG E. GABBIDON,

WILLIAM V. GRADY, ESQ.
District Attorney
Allison J. Stuart, Esq.
Senior Assistant District
Attorney for Plaintiff

Defendant.

ERIC S. SHILLER, ESQ.
Attorney for the Defendant

Notice of Motion _____ X
Affidavit in Support _____ X
Affirmation in Response _____ X
Reply Affirmation _____ X

The foregoing documents were considered in deciding this motion.

The defendant has been indicted for Criminal Sex Act in the First Degree, a Class B Violent Felony (Penal Law §130.50[2]); Rape in the First Degree, a Class B Violent Felony (Penal Law §130.35[2]; two counts of Criminal Sexual Act in the Third Degree, a Class E Felony (Penal Law §130.40[2]) and Endangering the Welfare of a Child, a Class A Misdemeanor (Penal Law §260.10[1]).

Defendant was represented from the outset by the Public Defender's office who made various pre-trial motions on his behalf. The Court decided those motions and granted the defendant a series of pre-trial hearings.

Those pre-trial hearings were scheduled to begin on the day the defendant appeared before me with counsel and pled guilty to the

first count of the indictment in full satisfaction of the indictment. The defendant's plea of guilty was entered on June 11, 2014.

DEFENDANT'S CLAIM

By letter dated June 16, 2014, the defendant wrote to the Court seeking to withdraw his guilty plea and requesting a new attorney.

Subsequent to the receipt of that letter, the Court, pursuant to the defendant's request, relieved the Public Defender's office from representing him and appointed Eric S. Shiller, Esq. to represent him.

The defendant now moves to withdraw his plea of guilty pursuant to CPL §220.60[3].

The defendant argues in his affidavit dated September 10, 2014 that he should be permitted to withdraw his plea because of the advise and tactics of his attorney. He claims that the Public Defender's office representative "pressured and badgered" him to accept the proposed disposition and to plead guilty. This purported pressure included the defendant's wife visiting him at the courthouse to "pressure" him into accepting the guilty plea. He claims that he did not have a clear mind and was coerced into pleading guilty.

Further, the defendant claims that he is not guilty of the charge and that he would not have waived his right to a suppression hearing and to a jury trial but for the extreme pressure put on him by his attorney, Susan Mungavin.

DISCUSSION

The decision to permit a defendant to withdraw his guilty plea rests with the sound discretion of the trial court. CPL §220.60[3]; People v. Lisbon, 187 AD2d 457 (2nd Dept. 1992). Likewise, the nature and extent of the fact finding procedures prerequisite to the disposition of such a motion also rests largely in the discretion of the judge to whom the motion to withdraw a guilty plea is made. People v. Tinsley, 35 NY2d 926.

As a general rule, where a defendant wishes to withdraw his guilty plea alleging complaints regarding his counsel, he should be represented by a different attorney. People v. Dixon, 29 NY2d 55.

In the instant matter, the defendant has been appointed new counsel. Only in the rare instance will the defendant be entitled to an evidentiary hearing when seeking to withdraw his guilty plea. Tinsley, *supra*.

It is generally sufficient to afford the defendant a reasonable opportunity to present his specific contentions by means of both written and oral applications. People v. Cole, 295 AD2d 360 (2nd Dept. 2002) app. den. 98 NY2d 709.

It is also important to keep in mind that a guilty plea should mark the end of a criminal case, not a gateway to future litigation. People v. Alexander, 97 NY2d 482; People v. Taylor, 65 NY2d 1.

The submissions of counsel, the defendant's affidavit and the plea minutes are sufficient to permit the Court to make an informed determination on the present application.

Defendant's contentions that he did not wish to plead guilty, is innocent of the crime to which he plead guilty, and that he was forced to plead guilty by his attorney is all contrary to the sworn

statements made by the defendant at the time of his guilty plea.

In the plea colloquy, the following exchange occurred:

The Court: Before I accept your guilty plea, I'm going to ask you some questions to make sure I know that you understand what you are doing and that you are doing this voluntarily.

First of all, do you realize that instead of pleading guilty, you could have jury trial?

The Defendant: Yes, Sir.

The Court: Do you also understand that by pleading guilty, you are waiving your right to the hearing, that was a Huntley hearing, that was scheduled to begin today at approximately two o'clock?

The Defendant: Yes, Sir. (Plea minutes, pp. 4-5)

Shortly thereafter the following colloquy occurred:

The Court: Have you discussed your guilty plea with Ms. Mungavin and Mr. Rosen?

The Defendant: Yes.

The Court: Have you discussed with them what happened back in March of 2013?

The Defendant: Yes, Sir.

The Court: Have you talked to your lawyers about whatever factual or legal issues there might be in your case including any and all possible defenses you may have?

The Defendant: Yes, Sir.

The Court: Have you had enough time to discuss everything about this case with your attorneys?

The Defendant: Yes, Sir.

The Court: Are you satisfied with their advice and services?

The Defendant: Yes, Sir.

The Court: Based upon your own knowledge as to what happened as well as your conversations with your attorneys, have you concluded that it is in your best legal interests to plead guilty today?

The Defendant: Yes, Sir.

The Court: Are you pleading guilty voluntarily?

The Defendant: Yes, Sir.

The Court: Are you pleading guilty because you are, in fact, guilty?

The Defendant: Yes, Sir.

The Court: Do you feel you have been threatened, coerced, forced or pressured by anybody into pleading guilty?

The Defendant: No, Sir.

The minutes of the plea proceeding established that the plea was entered knowingly and voluntarily belying the defendant's claim of coercion. Cole, supra. The defendant's present protestations to the contrary, the plea proceedings demonstrate that he was satisfied with counsel's representation. Lisbon, supra.

The defendant's allegation that trial counsel coerced him into pleading guilty when he desired a full trial and that counsel portrayed no other option being available other than a plea of guilty are likewise refuted by the defendant's sworn statement during the plea allocution. People v. DeLeon, 254 AD2d 430 (2nd Dept. 1998) app. den. 92 NY2d 1030.

Defendant's assertion of innocence subsequent to his plea allocution does not necessitate a hearing on his motion to withdraw his guilty plea. The defendant's sworn statement during the plea colloquy reflects that he knowingly and voluntarily admitted committing the crime in question. His subsequent protestation of innocence, unsupported by any evidence beyond his own affidavit is insufficient to warrant a hearing on the issue. People v. DeFabritia, 296 AD2d 664 (3rd Dept. 2002) lev. den. 99 NY2d 557.

The record does not provide any support for the defendant's conclusory assertion prior to sentence that his attorney "pressured" him into entering his guilty plea, given his statements during the extensive plea colloquy to the contrary, his representation that he knowingly and voluntarily entered the plea and his admission that he committed the crime to which he plead guilty. People v. Seger, 171 AD2d 892 (2nd Dept. 1991), app. dismd. 78 NY2d 1080.

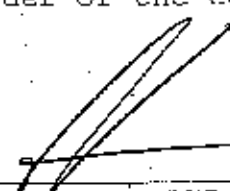
An accused's claim that he was coerced by his attorney alleging that his attorney had warned him of the strength of the prosecutor's case and the likelihood of a lengthy sentence in the event he was convicted after trial does not constitute coercion on the part of counsel. People v. Samuel, 208 AD2d 776 (2nd Dept. 1994), lev. den. 84 NY2d 1038. In Samuel, *supra*, the Court found that the defendant's claim of coercion was wholly belied by the fact that during his plea allocution, the defendant had unequivocally stated he had not been coerced into pleading guilty. The same is true in the instant matter.

The arguments raised in the defendant's motion are not only not supported by the record of the defendant's plea allocution, but they are completely contradicted by the defendant's sworn statements during the allocution.

Accordingly, the defendant's motion to withdraw his guilty plea is denied.

This constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
October 15, 2014



HON. STEPHEN E. GRELLER
COUNTY COURT JUDGE

TO: WILLIAM V. GRADY, ESQ.
Dutchess County District Attorney
Allison J. Stuart, Esq.
Senior Assistant District Attorney
236 Main Street
Poughkeepsie, NY 12601

Eric S. Shiller, Esq.
54 Noxon Street
P.O. Box 774
Poughkeepsie, NY 12602

